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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1086~~ 190.

METROPOLITAN BAG & PAPER DISTRIBUTORS ASSOCIATION, INC., YORKVILLE PAPER COMPANY, INC., A. E. MACADAM & CO., INC., JOHN H. FREE, INC., S. POSNER SONS, INC.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on March 19, 1957.

Citations to Opinions Below

The final order of the Federal Trade Commission is not reported, is designated *"Federal Trade Commission* vs. *National Paper Trade Association, Inc.,*

et al.", Docket No. 5592 and is printed in Petitioner's Appendix in the court below, now filed in this court. The opinion of the Second Circuit, United States Court of Appeals is reported in 240 Fed. 2d 341, and is printed in the Appendix to this petition, pp. 25-34.

Jurisdiction

The decree of the United States Court of Appeals for the Second Circuit, was dated and entered on March 19, 1957. R. Vol. II, pp. 61-63, pp. 35-38 infra, after prior denial on February 28, 1957 of Rehearing of opinion and decision, dated January 9, 1957. R. Vol. II, pp. 27-35, 57. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

Questions Presented

1. In a proceeding brought by the Federal Trade Commission against a national association, 23 constituent local associations, and some 1,000 merchant members, charging a single national conspiracy to fix prices by means of concerted adherence to "price books", may the Court of Appeals formulate a new charge, not previously made in the complaint or tendered as an issue, embracing local or regional price fixing efforts in earlier years, without offending the requirements of procedural due process as to notice?

2. In such a mass proceeding charging a single national conspiracy, may the Court of Appeals, in order to sustain the Commission order, as to the participation of these petitioners, draw its own infer-

ences from the evidence, not drawn by the Commission, and make new findings, of local price fixing efforts in earlier years, and thus disregard and deny effect to this Court's views on committing fact-finding to the Commission and not to the Courts, as set forth in *Federal Trade Commission* vs. *Pacific States Paper Trade Association*, 273 U. S. 52, 63, 71 L. Ed. 534, 538, 47 S. Ct. 255?

3. In such a mass proceeding against over 1,000 respondents, charging a single national conspiracy, may the Court of Appeals sustain the Commission order by finding numerous separate local conspiracies, and thus disregard and deny effect to this Court's views that a single conspiracy can not be proven by separate conspiracies executed through a key figure, as set forth in *Kotteakos* vs. *United States*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557.

4. In such a proceeding, charging a single national conspiracy, in which over 1,000 respondents were claimed to be linked by concerted adherence to "price books", and charging the maintenance of uniform discounts, may findings of participation of the instant petitioners be based merely on their membership in associations, without offending the requirements of due process as to substantial evidence?

Statute Involved

The statutory provisions involved are Section 5 of the Federal Trade Commission Act, 38 Stat. 719, c. 311, Sect. 5 enacted September 26th, 1914, as amended, 15 U. S. C., 10; Sect. 45. They are printed

in the Appendix, infra, p. 17. The relevant provisions read: 15 U. S. C. 10.

> Sect. 45(b)—Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce . . . it shall issue and serve upon such . . . corporation a complaint stating its charges in that respect . . . The . . . corporation so complained of shall have the right to appear . . . and show cause why an order should not be entered . . . requiring such corporation to cease and desist from the violation of the law so charged in said complaint . . . if . . . the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited . . . it shall state its findings as to the facts and shall issue and cause to be served on such . . . corporation, an order requiring such . . . corporation to cease and desist from using such method of competition or such act or practice.

Statement

In October, 1948, the Federal Trade Commission, respondent herein, served its complaint on these petitioners and others. It was directed against a national association, 23 regional associations, their officers, and 941 paper merchants, on a charge of a national conspiracy to fix prices, R. Vol. I, 7-36 (190a-200a).*

* References are to printed copies of Appendix used in Court below, now filed in this Court.

Those named constitute virtually two entire paper industries. One is fine paper sold to printers and stationers. The other is "wrapping paper", which includes drinking cups, boxes, twine, toilet tissue and numerous other items. While in actually different trades, merchants selling these products are members of the same national association, thru membership in local associations affiliated with the National Association.

Essentially, the conspiracy charged was the distribution by the national association, among the local associations, and the latter's merchant members, of compilations of statistics regarding costs of paper and national average percentage mark-ups on past sales. Two of these, the Blue Book, for fine paper, and the Brown Book, for wrapping paper, first issued in 1948,—it was claimed, were used by merchants as "price books" (199a). The instant petitioners are wrapping paper merchants, and their local association.

A few merchants in each local association were served with the complaint, as representatives of some 1000 other members of the 23 local associations, named, but not served, in a class suit.

Because of the prospect of burdensome and prolonged litigation involving hearings throughout the country, the respondents, including these petitioners, consented that the proceeding could be determined on whatever documents the Commission might introduce, without objection as to their authenticity. These documents had been obtained by the Commission from

the various respondents. The evidence was limited to these documents. The record comprises 12 volumes, totaling 3841 pages, and 6 volumes of exhibits, totaling 760 pages.

The Trial Examiner issued his Recommended Decision on September 28, 1951 (165a-189a). He found all but two of the parties served or named, guilty of a conspiracy to fix prices (189a).

The Commission issued its final order on September 24, 1954, some eight years after the commencement of the proceeding. The class suit was abandoned and the proceeding dismissed as to some 900 merchant members not served, but merely named. The complaint was dismissed as to five additional merchant members, chiefly because of lack of evidence that they used the "price books" (60a-63a).

The instant merchant petitioners, who had been made parties principally as representatives of a class, were included within the final order, issued against the national association, 22 local associations, some of their secretaries, these petitioners, and other merchant members. There was no finding or evidence, or any inference drawn as to these petitioners, of use of the price books, or of any actual prices in their area. *Federal Trade Commission* vs. *National Paper Trade Association of the United States, et al.* R. Vol. I, 1241-1354 (9a-164a).

The expressed basis and rationale for the findings as to the instant petitioners, appears in the special concurring opinion of Commissioner Lowell Mason,

and is characterized by him as "Guilt by Trade Association". He states (77a):

> "Here we are shown the petty machinations of a dozen over-enthusiastic trade association members. With no other link to their illegal agreements than a common membership in a trade association, we are asked to hack away at the entire wholesale paper trade industry exclaiming 'Everybody in the industry is a conspirator' ".

> "The procedure involves the combination of a conspiracy charge and a class suit with the finding of guilt by association. Each of these standing alone is well established by precedent and case law in the American judicial system" (82a).

The National Association, 22 regional associations and most of those charged, did not challenge the order.

On petition filed only by these petitioners and a few others, for review of this order, the Court below dismissed the complaint as to a number of the parties and affirmed as to these petitioners. Before the Court below, the Commission had conceded that the evidence of participation by these petitioners was insufficient (Commission's Brief before the Court below, p. 19, on file in this Court):

> "It is true that the documentary evidence, as it relates to these petitioners, contains no facts showing individual participation by petitioners in the acts and practices found by this Commission as to this conspiracy. Standing alone, this documentary evidence would not suport the findings and the order as they relate to these petitioners".

There was no evidence, apart from the documentary evidence. However, the Commission urged affirmance of its order on the ground that, since a conspiracy by others had been found, the documentary evidence sustained an inference that these petitioners participated in it (Commission's Brief to the Court Below, p. 20). These inferences, the Commission urged, flowed from their identity and affiliation, or, essentially, membership in the associations (Commission's Brief to the Court Below, p. 27).

The Court below, affirming as to these petitioners, in a detailed analysis of the role of each, purported to find substantial evidence of their participation, principally (1) from earlier local price fixing efforts, in 1936 and 1940, not charged in the complaint, and (2) from the fact of membership and holding office in either the local or national association. It stated the question before it as follows. R. Vol. II, pp. 61-63. (App. p. 27).

> "The Commission found a conspiracy clustering around the efforts of National to (1) issue Blue, Yellow and Brown (price) Books, (2) keep members cash discounts uniform, despite a shift of manufacturer's credit terms in 1946, (3) cooperate with regional efforts at price fixing . . . The chief question is whether there was substantial evidence to link the petitioners to the Second and Third of National's goals which we have stated".

The Court below thus eliminated the chief question before the Commission itself, namely, whether particular respondents had used the "price books",—in this case the Brown Book. The third goal referred

to, that the national association conspired to "cooperate with regional efforts at price fixing" had not been the subject of the charges brought in the complaint, R. 7 to 36 (190a to 200a).

The Court below thus formulated a new charge, never before presented, drew inferences which the Commission itself had not drawn, from selected bits and pieces of the evidence, and thus made a new finding as to these earlier local price fixing efforts. The alleged participation of the instant petitioners in these activities, as well as in those advancing the second goal, as to maintaining uniform discounts since 1946, were based on inferences arising largely from membership.

In its opinion, the Court below attributed the inferences it had itself drawn, to the Commission (App. p. 28). While announcing as an abstract principle that guilt could not be inferred from membership, its recital of the items linking the instant petitioners to the conspiracy found is, on its face, based either on membership or holding office, or on inferences as to activities unrelated to the complaint, and not drawn by the Commission. A good example of this is the Court's reference to the organization of a Credit Bureau Vol. II, p. 31 (App. p. 30), a matter that had never been in issue either in the complaint, the hearings, or the findings.

These petitioners had sought to point out to the Court below, on Petition for Rehearing, R. Vol. II, pp. 49, 54 (Petition for Rehearing, on file, pp. 7, 12), that there was no probative relation between the items of fact it had cited and the inferences it had drawn from them, and that these were really guesses.

Reasons for Granting the Writ

1. The questions presented are of importance in the administration and enforcement of the Federal Trade Commission Act. Whether the powers of the Courts of Appeals extend to formulating new charges in a Federal Trade proceeding, and whether they include the right in the court to draw its own inferences from the evidence, and make new findings, affects every such proceeding.

The questions involve the consideration, especially in conspiracy proceedings, of the requirements of procedural due process, and of the standards used by the Commission in determining the identity of those charged with wrongdoing.

If findings of individual participation in conspiracies may be based on membership alone, for acts of a few, all trade associations in this country and their members are affected. One of the Commissioners stated that "in the past decade there have been 71 cases before the Federal Trade Commission involving membership in trade associations". R. 1301 (87a).

The procedure adopted by the Court of Appeals marks a subtle evasion and erosion of the fundamental principles laid down by this Court, governing judicial review of determinations of fact made by administrative agencies, such as the Federal Trade Commission, which calls for the exercise of the supervisory powers of this Court.

Settlement of these questions by this Court is plainly in the public interest, since they are likely to be pre-

sented in numerous proceedings by the Federal Trade Commission, including those now pending.

2. The decision of the Court below is believed to be erroneous and conflicts with the applicable decisions of this Court.

a. Due process, provided by the Fifth Amendment to the Constitution, at a minimum, requires notice of charges. Its statutory expression is found in the Federal Trade Commission Act, 15 USC 10, Sect. 45, requiring "A complaint stating its charges", as well as in the Administrative Procedure Act, 5 USC 465, Sect. 1009(e)(4), requiring "observance of procedure required by law". Rule V of the Rules of the Federal Trade Commission provide for the service of a complaint "stating its charges".

The Statute commands, 15 USC, 11, Sect. 45(c), "The findings of the Commission, as to the facts, if supported by evidence, shall be conclusive".

While at first there was some doubt as to whether the Court could itself make new findings with respect to Commission orders, even where the practice in competition was held not unfair, *Federal Trade Commission* vs. *Curtis Publishing Company*, 260 U. S. 568, 582, 43 S. Ct. 210, 67 L. Ed. 408, 414, this Court has concluded that Congress has forbidden a Court of Appeals from substituting its appraisal of the facts for that of the Commission, *International Shoe Co.* vs. *Federal Trade Commission*, 280 U. S. 291, 303, 50 S. Ct. 89, 74 L. Ed. 431, 443.

This Court has held that courts can not pick and choose bits of evidence to make findings of fact con-

trary to the findings of the Commission, and that the weight to be given to the facts and circumstances proved or admitted, as well as the inferences reasonably to be drawn from them, are for the Commission, and not the courts. *Federal Trade Commission* vs. *Standard Education Society*, 302 U. S. 112, 117, 58 S. Ct. 113, 82 L. Ed. 141, 145; *Federal Trade Commission* vs. *Pacific States Paper Trade Association*, 273 U. S. 52, 63, 47 S. Ct. 255, 71 L. Ed. 534, 538; *Corn Products Refining Co., et al.* vs. *Federal Trade Commission*, 324 U. S. 726, 739, 65 S. Ct. 96, 89 L. Ed. 1320, 1332; *Federal Trade Commission* vs. *Staley Mfg. Co.*, 324 U. S. 746, 760, 65 S. Ct. 971, 977, 89 L. Ed. 1338, 1347.

In *Federal Trade Commission* vs. *Algoma Lumber Co.*, 291 U. S. 67, 73, 54 S. Ct. 315, 78 L. Ed. 655, 660, this Court disapproved of courts professing to accept the principle of the conclusiveness of administrative determinations in form while actually making their own appraisal from the evidence, "picking and choosing for itself among uncertain and conflicting inferences".

This principle complements the principle established by this Court, that it is reserved for the courts, as a judicial function, finally to determine whether particular methods, acts or practice in competition, found by the Commission, and concluded by it to be unfair, are, or are not unfair, as a matter of law.

Federal Trade Commission vs. *Gratz*, 253 U. S. 421, 426, 40 S. Ct. 572, 574, 64 L. Ed. 993.

In no reported case thus far found has a Court of Appeals, in sustaining a Commission order, also gone to the length of formulating a new charge not pre-

sented in the complaint. Fairly construed, the complaint in this proceeding linked respondents by means of "price books" R. 35, 36 (198a, 199a). It had always been assumed that the Commission could proceed only on the basis of the charges it had itself made, *Lichtenstein, et al.* vs. *Federal Trade Commission*, 194 F. 2d 607, 611 (C. A. 9), Cert. Den. 344 U. S. 819, 73 S. Ct. 15, 97 L. Ed. 638; rehearing denied 344 U. S. 882, 73 S. Ct. 163, 97 L. Ed. 683.

Neither the complaint nor the findings fairly embrace the charges sustained by the Court below. This Court has criticized looseness of expression in conclusions of administrative agencies, *Automatic Canteen Co.* vs. *Federal Trade Commission*, 346 U. S. 61, 81, 73 S. Ct. 1017, 1028, 97 L. Ed. 1454, 1467; *United States* vs. *Chicago, M., St. P. & Pr. Co.*, 294 U. S. 499, 510, 511, 55 S. Ct. 462, 467, 79 L. Ed. 1023, 1031, 1032.

In mass conspiracy cases, the common link has usually been found to be an ascertainable means or instrumentality, such as the Multiple Basing Point Delivered Price System, in *Federal Trade Commission* vs. *Cement Institute, et al.*, 333 U. S. 683, 68 S. Ct. 793, 92 L. Ed. 1010, or a concerted refusal to deal with those dealing with "design pirates", in *Fashion Originators Guild* vs. *Federal Trade Commission*, 312 U. S. 457, 61 S. Ct. 703, 85 L. Ed. 949. In the instant proceeding, the common link was concerted adherence to the Brown Book, charged in the complaint to be a "price book" R. 35 (198a, 199a). This charge was conceded by the Commission not to be supported by the evidence and was not made the basis for the decision of the Court below, which chose

instead to formulate a new charge of prior unrelated local conspiracies.

Both the complaint and findings are replete with references to the Blue Book and the Brown Book as the instrumentalities, adherence to which was deemed an unfair method of competition and whose use, or non-use, was made the criterion of inculpation or exculpation (199a, 39a-50a, 75a-77a).

In effect, the instant petitioners were tried on one charge and found guilty of another, not made. In support of this charge were findings the Court had no power to make.

b. The analysis of the Court below places great weight on the membership of each of the respondents in the local and national association. This Court decided, on May 16, 1957, in *Rudolph Schware* vs. *Board of Bar Examiners of New Mexico*, at the October, 1956, Term, 353 U. S. —, 77 S. Ct. 752, 760, 1 L. Ed. 2d 796, 805, in another context, that an automatic inference that all members of an organization shared the evil purposes or participated in the illegal conduct of some of the members, could not be made. There must be a rational connection between the fact proved and the ultimate fact inferred. *Tot* vs. *United States*, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519.

While this Court does not review facts, where it is obvious from the opinion of the Court below, and the avowed position of the Commission, that instead of substantial evidence, a mere scintilla or suspicion of the fact to be established has been relied upon, error is clear and conspicuous. *Consolidated Edison Co.* vs. *Na-*

tional Labor Relations Board, 305 U. S. 197, 229, 230, 234, 59 S. Ct. 206, 83 L. Ed. 126, 142; *National Labor Relations Board vs. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300, 59 S. Ct. 501, 83 L. Ed. 660, 665.

c. A charge of a single national conspiracy can not be shown by evidence of a number of separate conspiracies executed through a main key figure, *Kotteakos* vs. *United States*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557.

The danger in conspiracy suits of random and indiscriminate inculpation of individual defendants or respondents, and of transference of guilt from one to another across the line separating conspiracies, foreseen by this Court in *Krulewitch* vs. *United States*, 336 U. S. 440, 69 S. Ct. 719, 93 L. Ed. 790, and against which this Court warned, have fully come to pass for these petitioners.

Had the charges formulated by the court below been presented in the complaint, a trial at one place, within a limited time, would have disposed of the issues. Governmental action requiring these petitioners to attend trial at various parts of the country, to avoid possible inculpation from the testimony of some one, some place, over the course of eight years, as to numerous regional conspiracies which might be evidenced, when the petitioners are to be concerned with only one such alleged conspiracy, constitutes in itself a form of oppression.

At one point, the Court below itself regarded respondent Metropolitan's activities in 1941 not probative of a national conspiracy in 1948, as constituting

"delayed parallel action", App. pp. 31, 32. Yet it inferred (attributing the inference to the Commission which had not drawn it) that the activities of Metropolitan continued until 1948, App. pp. 28, 29. The Federal Trade Commission Act, 15 U. S. C. 10, Sect. 45, warrants a complaint only against a corporation which "has been or is using any unfair method of competition".

Wrongful activities, six years before a proceeding was commenced, have been held not to warrant sustaining an order, *Oregon-Washington Plywood Co. vs. Federal Trade Commission*, 194 F. 2d 48, 51 (CA 9—1952).

Erosion of principle may be achieved by debasing the currency of the law. If suspicion may be substituted for inference and association for conspiracy, results are obtained which appear to resemble conclusions on findings. They are then patterns forced upon unrelated facts. The addition of variables can not equate to a constant.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Statute

Federal Trade Commission Act. Title 15, U. S. C. § 45.

§ 45—Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices.

(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

The Commission is empowered and directed to prevent persons, partnerships or corporations, except banks, common carriers . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order

should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and

alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined

therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) The jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return

post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of

the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; order modified or set aside by Court of Appeals

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the

decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such a failure or neglect shall be deemed a separate offense. Sept. 26, 1914, c. 311, § 5, 38 Stat. 719; Feb. 13, 1925, c. 229, § 2, 43 Stat. 939; Mar. 21, 1938, c. 49, § 3, 52 Stat. 111; June 23, 1938, c. 601, § 1107(f), 52 Stat. 1028; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Mar. 16, 1950, c. 61, § 4(c); 64 Stat. 21.

Opinion of the Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 54, 55, 56—October Term, 1956.
(Argued November 14, 1956
Decided January 9, 1957.)
Docket Nos. 23372, 23373, 23676

METROPOLITAN BAG & PAPER DISTRIBUTORS ASSOCIATION, INC., et al.,
Petitioners,

—v.—

FEDERAL TRADE COMMISSION,
Respondent.

HARLEM PAPER PRODUCTS CORPORATION et al.,
Petitioners,

—v.—

FEDERAL TRADE COMMISSION,
Respondent.

ROBINS PAPER COMPANY OF BALTIMORE CITY,
Petitioner,

—v.—

FEDERAL TRADE COMMISSION,
Respondent.

Before:

CLARK, *Chief Judge*, and
FRANK and HINCKS, *Circuit Judges*.

Three petitions by Metropolitan Bag & Paper Distributors Association, Inc., and others, by Harlem Paper Products Corporation and others, and by

Robins Paper Company of Baltimore City, respectively, seek review of an order of the Federal Trade Commission finding the National Paper Trade Association of the United States, Inc., and its affiliates, including the petitioners, engaged in a conspiracy to fix prices and uniform discount terms in the sale and distribution of fine and wrapping paper products, contrary to §5(a) of the Federal Trade Commission Act, 15 U. S. C. §45(a), and directing them to cease and desist from specified activities to that end. Reversed as to Shuttleworth Wollny Co., Inc.; Imperial Bag & Paper Co., Inc.; Daniel W. Margolin; Robins Paper Company of Baltimore City; and Fred Free, Jr.; affirmed as to the remaining petitioners.

NATHAN FRANKEL, New York City (Barshay & Frankel, New York City, on the brief), for petitioners Metropolitan Bag & Paper Distributors Association, Inc., et al.

MAX WECHSLER, New York City (Wechsler & Solodar and Albert L. Solodar, New York City, on the brief), for petitioners Harlem Paper Products Corporation et al.

JOHN D. ALEXANDER, Baltimore, Md. (Duer & Taylor, New York City, and Wm. Pepper Constable, Baltimore, Md., on the brief), for petitioner Robins Paper Company of Baltimore City.

JNO. W. CARTER, JR., Atty., Federal Trade Commission, Washington, D. C. (Earl W. Kintner, Gen. Counsel, and Robert B. Dawkins, Asst. Gen. Counsel, Federal Trade Commission, Washington, D. C., on the brief), for respondent.

CLARK, *Chief Judge:*

These are three petitions to review a cease and desist order of the Federal Trade Commission, each petition being filed by paper merchants who belong to a different local trade association. The Commission's complaint had been directed against the National Paper Trade Association, its officers, 23 affiliated local associations, their officers, and some 941 paper merchant members, and charged them with conspiracy to fix uniform prices and discount terms in the sale and distribution of "fine paper" (printing and book paper, stationery) and "wrapping paper" (wrapping, toilet tissue, towels, drinking cups, etc.), in violation of §5(a) of the Federal Trade Commission Act, 15 U. S. C. §45(a).

The Commission found a conspiracy clustering around the efforts of National to (1) issue Blue, Yellow, and Brown (price) Books; (2) keep members' cash discounts uniform, despite a shift in manufacturers' credit terms in 1946; (3) co-operate with regional efforts at price-fixing. For the purposes of this review we must take the main conspiracy, spearheaded by National, as established and have to determine only whether the petitioners, operating somewhat on the periphery, have been properly implicated, i. e., whether as to each petitioner the Commission's finding of participation is supported by the necessary minimum of substantial evidence. *Excelsior Laboratory* v. *F. T. C.*, 2 Cir., 171 F. 2d 484, 486. The chief question is whether there was substantial evidence to link the petitioners to the second and third of National's goals which we have stated. A subordinate question the petitioners attempt to raise

is that they were unfairly discriminated against by the Commission's order of dismissal entered in favor of various correspondents.

I. *The New York City Petitioners*

(1) *Metropolitan Bag & Paper Distributors Association, Inc.* Four local trade associations—"New Jersey," "New York," "Cosmopolitan," and "Metropolitan"—engaged in a regional conspiracy to fix prices and credit terms of wrapping paper products from 1934 to the time of the complaint. There were six points of contact between this regional conspiracy and the national one: (1) all four local associations were dues-paying members of the national association; (2) in January 1936 the national group gave information to a regional council composed of three of these local associations engaged in price-fixing; (3) in April 1940 the national group organized a regional council of these four local associations for illegal activities; (4) in November 1943 the president of Cosmopolitan urged its members to pay national dues; (5) in January 1947 Cosmopolitan's Board of Directors discussed writing the national group concerning proposed standardized credit terms; and (6) in 1948 and 1949 officers of Yorkville Paper Company, Inc. (a member of Metropolitan), and A. E. MacAdam & Co., Inc. (another member of Metropolitan), served as officers of the national group, as did an officer of Harlem Paper Products Corporation (a member of Cosmopolitan).

We must accept the inferences drawn by the Commission that (1) the regional council created in 1940

continued in existence until the filing of the complaint; (2) the members of the local councils who had dealings with the national group in 1936, 1940, and 1947 knew of its purposes and joined in the conspiracy to further them; and (3) these local trade associations on continuing to be members of National are to be charged with all they would have learned had they tried to discover what National was doing with their dues and moral support. *Phelps Dodge Refining Corp.* v. *F. T. C.* 2 Cir., 139 F. 2d 393, 396. Metropolitan Bag & Paper Distributors Association, Inc., as one of these four local trade associations, can thus be found to be a national conspirator.

(2) *Yorkville Paper Company, Inc.* This company was a member of Metropolitan in December 1941; and Arthur H. Stein, an officer of Yorkville, was president of Metropolitan at that time. Stein was an officer of the national group for the year 1948-1949, and was a speaker at the 1948 national convention. He was also president of Metropolitan in 1942 when the organization was engaged in efforts at standardizing credit terms in the industry and similar practices. While Stein was Metropolitan's president that group paid at least $750 dues to the national association. Thus there was sufficient proof to link Yorkville to the national conspiracy.

(3) *A. E. MacAdam & Co., Inc.* This corporation was a member of Metropolitan in December 1941, June 1942, and at the time the complaint was filed. It was represented by Alfred E. MacAdam, III, at Metropolitan's meetings of December 1941 and June

1942. In 1941 Alfred E. MacAdam was appointed to Metropolitan's Finance Committee, charged with getting money to cover the expense of national dues and the local credit bureau. MacAdam was chairman of the local credit bureau committee which worked with other local trade associations to establish uniform regional credit terms. MacAdam was a speaker at the 1948 national convention and was a national officer for 1948-1949. Consequently there was enough evidence to connect this corporation with the national conspiracy.

(4) *John H. Free, Inc.* This corporation was a member of Metropolitan in 1941, 1942, and at the time the complaint was filed. It was represented at the December 1941 and June 1942 meetings of Metropolitan where the members discussed paying national dues; forming a credit bureau; distributing resale price tables; and establishing central control over all advertising done by members of Metropolitan.

The Commission could properly infer that this corporation knew the purposes of Metropolitan, knew of Metropolitan's connection with the national conspiracy, and continued to remain a member of Metropolitan and the National Association. John H. Free, Inc., was thus adequately linked to the national conspiracy.

(5) *S. Posner Sons, Inc.* The evidence against this corporate member of Metropolitan is identical with the evidence against John H. Free, Inc.

(6) *Shuttleworth Woolley Co., Inc.* This was another corporate member of Metropolitan, but there is no

proof that its representatives attended any meetings, paid any dues, or participated in the activities of Metropolitan or the national group. There is no basis for inferring that the petitioner had any knowledge of Metropolitan's illegal activities. There is no evidence that Metropolitan was a small group, and the probability is that it was large inasmuch as the Commission began the action by naming four persons at random to represent the class of Metropolitan's members. The petitioner is one of the members so selected. Although the petitioner was in the same trade as Metropolitan and would presumably benefit from Metropolitan's illegal acts, the Commission may not infer participation in a conspiracy from mere membership in the trade association without more. *Phelps Dodge Refining Corp.* v. *F. T. C.*, *supra*, 2 Cir., 139 F. 2d 393, 396.

(7) *Fred Frey, Jr.* The only evidence against this individual is his admission that he was secretary of Metropolitan at the time the complaint was filed—October 5, 1948. Metropolitan, as indicated previously, was last shown to have participated actively in the national conspiracy in 1940, and the Commission inferred continued participation in it because Metropolitan continued to pay national dues and several officers of Metropolitan's corporate members were national officers in 1948. The Commission argues that active participation in 1948 is shown by Metropolitan's attempt to fix the regional resale price of wrapping paper products in 1941 and National's adoption of that goal on a larger geographical scale in 1947-1948. Such delayed parallel action seems too meager evi-

dence to be probative of conspiracy, even though two officers of Metropolitan's member corporations were officers of the national group for 1948-1949. Without proof of the role of these two officers in the national conspiracy we would hesitate to affirm a finding that Metropolitan was visibly engaged in the national conspiracy at the time when Fred Free became its secretary. Accepting such a finding, *arguendo*, there is still no substantial evidence that Free was a conspirator. *Phelps Dodge Refining Corp.* v. *F. T. C.*, *supra*, 2 Cir., 139 F. 2d 393, 397. In the *Phelps Dodge* case we dealt with a "board member" rather than a "secretary," but there is nothing in the present record to suggest that Free knew about Metropolitan's illegal life; and to infer so much from his title is unwarranted.

(8) *Harlem Paper Products Corporation.* Harlem was a corporate member of Cosmopolitan—one of the four local trade associations in greater New York City. Mr. David Kasson, a leader in all aspects of restraint of trade in wrapping paper products in this region from 1934 to 1947, represented Harlem throughout this period, including the times when he served on the 1936 and 1940 regional councils. There is sufficient evidence against Harlem.

(9) *David Kasson.* There is adequate evidence to connect this individual with the national activities, as well as regional efforts at unfair competition. In 1943 he urged members of Cosmopolitan to pay national dues, and in 1948 he was on the National Association's Board of Directors. He was the moving

spirit in local efforts at uniform credit terms in 1941-1942, and he discussed a letter from the National Association in 1947 which dealt with the same topic.

(10) *Imperial Bag & Paper Co., Inc.; Daniel W. Margolin d/b/a Liberty Bag & Paper Co.* These two members of Cosmopolitan were selected at random to represent the class of members. The proof against them is identical with that against Shuttleworth Wollny Co., Inc., discussed previously, and is similarly insufficient.

II. *The Baltimore Petitioner; Robins Paper Company*

The sole petitioner from Baltimore is Robins Paper Company, a member of the local Maryland trade association. Maryland was engaged in restraint of trade in 1932 and during the NRA period—1933 through 1936. In 1947-1948 Maryland complied with a request of the National Association, of which it was a member, to submit its minutes to the national group for approval. The Commission is warranted in inferring that the "approval" amounted to censorship and that Maryland and National were then engaged in fixing prices of fine and wrapping paper products. This is borne out by the number of officers of Maryland's members who were on committees of National for 1948-1949.

The record reveals that Robins resigned from Maryland in 1936. In its answer Robins admitted being a member of Maryland at the time the complaint was filed in 1948. There is no evidence that Robins

was an active member, paid dues, attended meetings, or had knowledge of Maryland's activities. None of Robins' officers were on the committees of the national trade association. Robins appears to be a member selected at random to represent the class of members of Maryland. Robins was represented at one meeting of Maryland in 1932 where local illegal trade practices were discussed. It continued membership during NRA days when similar practices were continued with government approval. This knowledge of Maryland's behavior during the depression was not so damning as to put Robins on notice at the time it rejoined the trade association that Maryland might be engaged in a national price-fixing conspiracy; consequently Robins cannot be charged with knowledge of all that diligent inquiry would have revealed concerning Maryland's role in this present conspiracy.

The remaining points raised by the petitioners we find without merit. The findings of the Commission were sufficiently detailed to permit appellate review; and the Commission's decision not to proceed against other conspirators appears to be within its discretion so as to give the present petitioners no ground for complaint on this review.

The order of the Commission on review is set aside as to petitioners Shuttleworth Wollny Co., Inc.; Imperial Bag & Paper Co., Inc.; Daniel W. Margolin d/b/a Liberty Bag & Paper Co.; Robins Paper Company; and Fred Free, Jr. It is affirmed as to the remaining petitioners, and an order of enforcement against them will be entered by us.

Final Decree

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 23372

METROPOLITAN BAG & PAPER DISTRIBUTORS ASSOCIATION, INC., et al.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

No. 23373

HARLEM PAPER PRODUCTS CORPORATION, et al.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

No. 23676

ROBINS PAPER COMPANY OF BALTIMORE CITY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

FINAL DECREE AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST AS TO CERTAIN PETITIONERS AND SETTING ASIDE ORDER TO CEASE AND DESIST AS TO CERTAIN OTHER PETITIONERS

Metropolitan Bag & Paper Distributors Association, Inc., Fred Free, Jr., individually and as its Secretary,

A. E. MacAdam & Company, Inc., John H. Free, Inc., Shuttleworth Wollny Co., Inc., S. Posner Sons, Inc., Yorkville Paper Company, Inc., Harlem Paper Products Corporation, Imperial Bag & Paper Co., Inc., Daniel W. Margolin doing business as Liberty Bag & Paper Co. and David Kasson, having filed in this Court on December 7, 1954, and Robins Paper Company of Baltimore City, having filed in the United States Court of Appeals for the Fourth Circuit on December 8, 1954, their petitions to review and set aside insofar as said petitioners are concerned, an order to cease and desist issued against said petitioners, among others, on September 24, 1954, by the Federal Trade Commission, respondent herein, in a proceeding before said respondent entitled "In the Matter of National Paper Trade Association of the United States, Inc., et al"; and the United States Court of Appeals for the Fourth Circuit having removed and transferred said petition filed by Robins Paper Company of Baltimore City to this Court on May 26, 1955; and these causes having been heard by this Court on briefs and oral argument; and this Court having rendered its decision on January 9, 1957, setting aside said order to cease and desist as to petitioners Shuttleworth Wollny Co., Inc., Imperial Bag & Paper Co., Daniel W. Margolin doing business as Liberty Bag & Paper Co., Robins Paper Company of Baltimore City, and Fred Free, Jr., and denying said petitions and affirming said order to cease and desist as to petitioners Metropolitan Bag & Paper Distributors Association, Inc., A. E. MacAdam & Company, Inc., John H. Free, Inc., S. Posner Sons, Inc., Yorkville Paper Company, Inc., Harlem Paper Products Corporation and David

Kasson; and Harlem Paper Products Corporation having filed in this Court on February 1, 1957, its petition for rehearing; and Metropolitan Bag & Paper Distributors Association, Inc., A. E. MacAdam & Company, Inc., John H. Free, Inc., S. Posner Sons, Inc. and Yorkville Paper Company, Inc. having filed in this Court on February 20, 1957, their petition for rehearing; and this Court having on February 18, 1957, and February 28, 1957, respectively, denied said petitions for rehearing;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the said order to cease and desist be, and it hereby is, set aside as to petitioners Shuttleworth Wollny Co., Inc., Imperial Bag & Paper Co., Inc., Daniel W. Margolin doing business as Liberty Bag & Paper Co., Robins Paper Company of Baltimore City and Fred Free, Jr.; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the aforesaid petitions to review and set aside said order to cease and desist, as to petitioners Metropolitan Bag & Paper Distributors Association, Inc., A. E. MacAdam & Company, Inc., John H. Free, Inc., S. Posner Sons, Inc., Yorkville Paper Company, Inc., Harlem Paper Products Corporation and David Kasson be, and they hereby are, dismissed, and that said order to cease and desist be, and it hereby is, affirmed and enforced as to said petitioners and that said petitioners be, and they hereby are, commanded to obey said order to cease and desist and to comply therewith; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within ninety days after the entry of this decree petitioners Metropolitan Bag & Paper Distributors Association, Inc., A. E. MacAdam & Company, Inc., John H. Free, Inc., S. Posner Sons, Inc., Yorkville Paper Company, Inc., Harlem Paper Products Corporation and David Kasson shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied with said order to cease and desist.

Without prejudice to the right of the United States, as provided in Section 5(l) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the aforesaid order to cease and desist; hereby affirmed and enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of these causes to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court;

CHARLES E. CLARK
CARROLL C. HINCKS,
United States Circuit Judges.

Dated: March 19, 1957.

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No. 190

Office - Supreme Court, U.S.
FILED
AUG 16 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Docket No. 1086

METROPOLITAN BAG & PAPER DISTRIBUTORS ASSOCIATION, INC., YORKVILLE PAPER COMPANY, INC., A. E. MACADAM & CO., INC., JOHN H. FREE, INC., S. POSNER SONS, INC.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO FEDERAL TRADE COMMISSION'S BRIEF IN OPPOSITION

NATHAN FRANKEL,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 190

METROPOLITAN BAG & PAPER DISTRIBUTORS ASSOCIATION, INC., YORKVILLE PAPER COMPANY, INC., A. E. MACADAM & CO., INC., JOHN H. FREE, INC., S. POSNER SONS, INC.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

REPLY TO FEDERAL TRADE COMMISSION'S BRIEF IN OPPOSITION

The opposition brief of the Commission emphasizes the necessity for review. It deals with the questions presented by denying, or ignoring their existence, by begging the questions, or confusing the issues by semantics.

Thus, in stating the question presented, it ignores the four questions presented in the Petitioners' petition and erroneously states as the question before this Court the adequacy of the evidence.

Confusion results from the Commission's exercise in semantics, in misreading the opinion of the Court below regarding the National Association's coopera-

tion with regional price fixing efforts, as constituting a nation-wide conspiracy.

The issues, as thus sharpened, are common to many other cases of mass conspiracy brought by the Commission. These issues should be authoritatively resolved for the guidance of the Commission, and of the Court of Appeals, in dealing with charges against entire industries or trades.

Reply on the Issue of New Charges

The Commission implies, without clearly so asserting and without demonstration (Comm. Br. 7) that the complaint included a charge that one of the goals of the single national conspiracy charged, was "cooperating with regional efforts at price fixing". The heart of the complaint is Paragraph Eight (Pet. App. 196a-199a). Fairly construed, it does not put any respondent on notice to meet a charge either of (a) separate local or regional price fixing conspiracy, or (b) a single national conspiracy "to cooperate with regional price fixing efforts".

Only slight analysis is required to indicate that the goal ascribed as the single common understanding is vague and meaningless. If the National Association cooperated with only one region in price fixing efforts, the conspiracy thus charged would still be local, not national. The market areas and problems of the New York, Chicago, Pittsburgh, Wisconsin and the other numerous associations, differed widely (Pet. App. 4a-9a).

If the National Association cooperated with price fixing efforts in several regions, the conspiracies would still be separate and local, although executed through a common key figure,—the precise situation presented in *Kotteakos v. United States*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557. No common understanding would link merchants in New York with those in Chicago, Pittsburgh or elsewhere.

Such a situation cannot be transformed into a single national conspiracy by ascribing a motive, intent, purpose or "goal" to the National Association of assisting several regional price fixing efforts, or of price fixing in general. Such a "National" goal does not make a national, or nation-wide goal. This is playing with words.

It is tortuous reasoning to claim that the cooperation of the National Association in regional price fixing efforts in 1934 subjects the members of any regional association, which joined the National Association at some time not shown in the record, to a charge that they became participants in the National Association's "goal", adopted at some later date, to assist the region's wrongful activities. This stands the alleged conspiracy on its head.

Nor can the wicked motives ascribed to the National Association convert regional efforts into a common understanding among the various regions. To be unlawful, there must be a conspiracy to do something, not merely to harbor evil thoughts. Otherwise numerous unrelated industries or trades could be charged together with a single conspiracy because they were all linked by a similar iniquitous motive.

Where a single major conspiracy was charged, this Court has dismissed a bill in equity for an injunction on the ground of multifariousness, as to persons involved in a minor local conspiracy, *United States* v. *Reading Co.*, 226 U. S. 324, 57 L. Ed. 243, 33 S. Ct. 90.

The Commission now attempts (Comm. Br. 7) to dispose of the "regional conspiracy" referred to by the Court below as "merely a shorthand phrase". But it still relies on the new charge formulated by the Court below, and not presented in the complaint or in the proceedings, that these Petitioners joined a single nation-wide conspiracy by joining a National association whose "goal" was to "cooperate with regional efforts at price fixing" at an earlier time.

Reply on the Issue of New Findings

The Commission deals with this question by attempting to relate the alleged earlier regional conspiracy ambiguously either (1) to the new charge of an imputed goal to the National Association of cooperating with this regional conspiracy discussed above, or (2) to a "National conspiracy 'spearheaded by National' to fix prices in the entire industry" (Comm. Br. 7).

The latter charge, based on the use of the Brown Book, for wrapping paper, first issued in 1948, concededly does not apply to these petitioners, who never used this "Brown Book". The Commission has misread the opinion of the Court below, which referred to a regional conspiracy in 1934, 1935, or 1941, 1942 (during the period of NRA or OPA controls) and

the National Association's use in 1948 of price books, as "delayed parallel action" and therefore as not probative (Pet. for Cert. 31, 32).

The new findings of a regional conspiracy now complained of, are either related, without basis, to the new charge discussed above, or are themselves made the basis of a separate charge of local conspiracy, neither of which was previously presented as an issue.

The Commission has seen fit (Comm. Br. 9) to list numerous exhibits not relevant to the issues before this Court, which might reflect an alleged regional conspiracy in the 1930's. Most of them are Minutes of other Associations and constitute declarations of alleged co-conspirators. It might be noted that if these respondents had been themselves confronted merely with a charge of a regional conspiracy, proof would have first been required of their having become participants in such a conspiracy, before these declarations could have been deemed admissible against them.

The Commission itself, as previously noted, had neither drawn the inference, nor made the findings which the Court below ascribed to it (Pet. for Cert. 28, 29), such as that "the regional council created in 1940 continued in existence until the filing of the complaint" (1948); or that its members knew of National's purposes, most of which the complaint itself (Pet. App. 191a) set forth as worthy and legal.

Reply on the Issue of Separate Local Conspiracies

The Court below itself referred to these petitioners as "operating somewhat on the periphery" (Pet. for Cert. 27). Actually, both the Commission and the Court below strayed widely beyond the group which has been found to have entered into a nation-wide conspiracy, to charge these petitioners as participants for wholly unrelated activities.

The lack of any relationship between the alleged local conspiracy of 1934 and the single national conspiracy of 1948, brings this case squarely within the principles of *Kotteakos* v. *United States*, 328 U. S. 750.

Reply on the Issue of Membership as Probative

The Commission concedes the principle that membership alone in a trade association would not be sufficient (Comm. Br. 7, 8). However, it cites *Federal Trade Commission* v. *Cement Institute*, 383 U. S. 683, as applicable. The common practices found sufficient there, however, to link firms to a nation-wide conspiracy, unlike here, were based on the finding of (1) "That the Institute was organized to maintain the Multiple Basing Point System", and (2) "that the delivered prices . . . were . . . identical with the delivered prices of all their competitors", *Cement Institute*, 333 U. S. 719, 68 S. Ct. 812. In the case at bar, there are no such findings.

The equivalent in this case would be, if that were so, the petitioners' common adherence to the Brown

Book. Without this, we are left with the naked fact of membership or the holding of some minor office.

Conclusion

The combination of charges and findings in this case, disappears before the simple question "With whom and when, did these petitioners agree to do what?". This entire proceeding resembles the bed of Procrustes, supervised by the Commission. If particular respondents do not fit in the category of using price books, they are made to fit on the bed of guilt, by elongation of their limbs, by new charges or new findings.

The result obtained by the Commission is made possible only by an abuse of the doctrine of conspiracy, and by ignoring rules of evidence prevailing, not in courts of law, but among average men, and by a finding, as Commissioner Lowell Mason stated, of "guilt by trade association" (Pet. App. 74a-78a), making "an Abilene, Texas, paper dealer blood brother conspirator with one in Hickory, North Carolina, and ensnares them both to a Nekoosa, Wisconsin merchant, in a joint, common cause of action with a Bensonville, Illinois dealer".

Respectfully submitted,

NATHAN FRANKEL,
REUBEN BARSHAY,
Counsel for Petitioners.

Dated: August 14, 1957.

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No. 190

FILED
JUL 12 1957
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

METROPOLITAN BAG & PAPER DISTRIBUTORS ASSOCIATION, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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Statute:

Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45:

Section 5 (a) (1) 2

Section 5 (a) (6) 2

In the Supreme Court of the United States

OCTOBER TERM, 1957

No.

METROPOLITAN BAG & PAPER DISTRIBUTORS ASSOCIATION, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 25–34) is reported at 240 F. 2d 341.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1957. The petition for a writ of certiorari was filed on June 13, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court of appeals correctly held that there is substantial evidentiary support for the Fed-

eral Trade Commission's finding that petitioners had participated in a nationwide price-fixing conspiracy.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45, provides in part as follows:

> (a)
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> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
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> * * * * *
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> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
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> * * * * *

STATEMENT

On October 5, 1948, the Federal Trade Commission issued a complaint charging that the National Paper Trade Association ("National"), twenty-three affiliated local trade associations, including petitioner Metropolitan Bag & Paper Distributors Association, Inc. ("Metropolitan"), various officials of the associations, and all of their dealer members, had conspired to fix uniform prices and discount terms in the sale and distribution of fine and wrapping paper, in violation of Section 5 of the Federal Trade Commission Act (Pet. App. 190a–205a, Resp. App. 31–32 [1]).

[1] "Pet. App." refers to petitioners' appendix in the court of appeals, and "Resp. App." refers to the Commission's appendix in that court.

Petitioners filed an answer in which they consented to the introduction of documentary and other evidence in support of the complaint, conceded that "inferences may be drawn from such answer and documentary evidence in support of the allegations of the complaint" (Pet. App. 206a), and stated that "they will not offer explanation of or evidence to contradict the evidence" which they consented to being "made a part of the record" (*ibid.*).

After lengthy administrative proceedings, at which a large number of documents were introduced in evidence (*id.*, 2a–3a), the Commission, in September 1954, issued detailed findings in which it concluded that a nationwide conspiracy to fix paper prices had been shown, and issued a cease-and-desist order (*id.*, 4a–68a). In brief, the Commission found that the conspiracy had been spearheaded by National, that the various local constituent associations, in cooperation with National, had effectuated the agreement, and that a number of dealer members of the associations, including petitioners, had been parties to the scheme.

Specifically, the Commission found that since 1934 National had conducted "annual cost and selling price surveys" among its members "in all sections of the country" (*id.*, 39a); that it had distributed to its members various price books (*id.*, 39a–46a) which the members had used "in determining the prices at which they sold their products" (*id.*, 41a; 47a–49a); that officials of the national association had discussed the preparation and use of the price books at local and

regional association meetings (*id.*, 46a); that the various dealer members in each respective trade area calculated their prices in a similar manner (*id.*, 48a), and used publications of the national association to fix such prices (*id.*, 49a); and that executive officials of the local and regional associations in turn cooperated with National in advising and assisting members in arriving at uniform cash discounts in their respective trade areas, and discussed this matter at meetings of the local associations (*id.*, 52a). The Commission further found that each of the regional associations "has engaged in activities relating to the pricing by its members of their paper products," and that "[t]he record contain[ed] numerous exhibits relating to the activities of these associations which indicate that they have concurred in and implemented activities of the National Association" of which the Commission cited "typical examples" (*id.*, 53a–56a).

On the basis of the entire record, the Commission concluded (*id.*, 57a) that the dealer conspirators, together with National and the local associations and their officers, had "entered into and * * * carried out an unlawful planned course of action, understanding and agreement to hinder, lessen, eliminate, limit, and restrain competition in prices, practices, terms and discounts * * * in the sale and distribution of fine and wrapping paper," and, pursuant to such conspiracy, had "established uniform and identical prices, terms and discounts * * * in their respective trade areas" (*id.*, 58a).

Judicial review of the Commission's order was sought only by one local trade association and several

dealers. The court of appeals set aside the order as to five of the dealers for lack of evidentiary support, holding that "the Commission may not infer participation in a conspiracy from mere membership in the trade association without more" (Pet. 31). The court concluded, however, that there was substantial evidence linking the other parties to the conspiracy, and it affirmed and enforced the order as to them. Specifically, it ruled (Pet. 28) that Metropolitan, together with three other local trade associations in the New York City area, had engaged in a "regional conspiracy to fix prices and credit terms of wrapping paper products from 1934 to the time of the complaint," and that there were "six points of contact between this regional conspiracy and the national one"; and that, in 1948 and 1949, officials of the dealers had been officers of Metropolitan or of the other local associations, and had actively participated in their affairs (Pet. 29–30).

ARGUMENT

Petitioners do not challenge the Commission's findings that a nationwide price-fixing conspiracy existed in the fine and wrapping paper industry, and that the national trade association, a large number of local associations, and numerous dealer members were parties thereto. The only question which they properly present is, as framed by the court of appeals, "wnether as to each petitioner the Commission's finding of participation [in the national conspiracy] is supported by the necessary minimum of substantial evidence" (Pet. 27). The court of appeals, upon a careful review of the evidence, held that the Com-

mission's findings that petitioners had been parties to such a national conspiracy were supported by substantial evidence. The correctness of these factual rulings presents no question of general importance warranting further review. Furthermore, we submit that the court below correctly decided these questions.

Recognizing that "this Court does not review facts" (Pet. 14), petitioners argue (1) that although the Commission's complaint charged "a single national conspiracy" (Pet. 15), the court of appeals upheld the order against petitioners only by "formulat[ing] a new charge of prior unrelated local conspiracies" (Pet. 14), and by relying on "evidence of a number of separate conspiracies executed through a main key figure," in violation of *Kotteakos* v. *United States*, 328 U. S. 750 (Pet. 15); and (2) that the Commission's findings of petitioners' "individual participation" in the conspiracy were "based on membership alone" in a trade association (Pet. 10), and that the court of appeals, in upholding those findings, placed too "great weight on the membership of each of the respondents [petitioners] in the local and national association" (Pet. 14). These arguments, we believe, misconceive the basis for the court of appeals' decision.

Although the court of appeals stated that four local trade associations, including petitioner Metropolitan, "engaged in a regional conspiracy to fix prices and credit terms of wrapping paper product from 1934 to the time of the complaint" (Pet. 28), the court did not uphold the Commission's order against petitioners on the basis of their participation in a regional conspiracy which was something separate and apart from

the national scheme. On the contrary, the court pointed out (Pet. 27) that the "main conspiracy, spearheaded by National" must be deemed established, and that the "chief question is whether there was substantial evidence to link the petitioners" to certain of the goals of that conspiracy, including that of "cooperat[ing] with regional efforts at price-fixing." The so-called "regional conspiracy" referred to by the court, therefore, was merely a shorthand phrase for the efforts of the local trade associations in the area to effectuate the national conspiracy, "spearheaded by National," to fix prices for the entire industry.[2] The complaint in this case did not charge, as petitioners contend (Pet. 13), that their participation in the conspiracy was limited to the use of "price books." It broadly alleged that they, together with numerous other associations, firms, and individuals, had been parties to a general price-fixing conspiracy, the means of which included a wide variety of anticompetitive practices (see Paragraph Eight of the Complaint, Pet. App. 196a–197a). The fact that petitioners were not shown to have participated in the use of price books would not preclude the Commission from holding, upon the basis of other evidence, that they had participated in the conspiracy.

Nor did the court uphold the order against the dealer petitioners solely upon the basis of their trade

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[2] Thus, the court did not draw "inferences which the Commission itself had not drawn," as petitioners contend (Pet. 9). The fact that the court set forth some of the evidence in greater detail than the Commission did affords no basis for challenging the decision below.

association membership. Indeed, the court set aside the Commission's order as to several dealers with respect to whom it found that the only conspiratorial link was association membership, on the ground that "the Commission may not infer participation in a conspiracy from mere membership in the trade association without more" (Pet. 31).

However, the court of appeals properly gave appropriate weight to the individual dealers' participation in the price-fixing activities of the national and regional associations. These groups were the vital links through which the conspiracy was effectuated, and the court was fully justified in relying upon such participation as significant evidence that petitioners were parties to the conspiracy. Cf. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 719–720, where evidence that particular firms were members of, and their officials were active in affairs of a national trade association which "participated in numerous activities intended to eliminate price competition through the collective efforts" of its members, was held pertinent in linking firms to a nationwide conspiracy. Here, as in *Cement Institute*, the record contains "abundant evidence as to common practices of these respondents [petitioners] and the others on the basis of which the Commission was justified in

finding cooperative conduct among all to achieve * * * price uniformity" (p. 719).[8]

CONCLUSION

The decision below is correct, no important question is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] We shall not burden the Court with a detailed summary of the evidence upon which the court below relied. As an illustration, however, we note that the record shows, with respect to Metropolitan, that the four local associations in the New York City area pledged cooperation with each other as early as 1934 (Ex. 749, Pet. App. 322a; Ex. 753–A—753–C, Pet. App. 325a), and acted jointly to fix resale prices and credit terms (Ex. 744–A, Resp. App. 34; Ex. 761, Resp. App. 38–39; Ex. 747–A, and 747–B, Pet. App. 318a–319a; Ex. 748–A—748–C, Pet. App. 320a, 321a; Ex. 753–A—753–C, Pet. App. 325a; Ex. 755–A—755–C, Pet. App. 327a; Ex. 762, Resp. App. 39; Ex. 764, Resp. App. 40–41; Ex. 765, Resp. App. 41; Ex. 766, Resp. App. 42; Ex. 653–A—653–B, Pet. App. 295a–296a; Ex. 654–A—654–D, Pet. App. 302a–303a; Ex. 657–A—657–D, Pet. App. 305a–306a).

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